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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHAARE TEFILA CONGREGATION, ET AL.,
Petitioners,

v.

JOHN WILLIAM COBB, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE THE STATE OF MARYLAND

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Pursuant to United States Supreme Court Rule 36.2, the State of Maryland submits this brief as amicus curiae in support of petitioners, Shaare Tefila Congregation. Because this brief is being sponsored and filed by a State, consent to its filing is not required. Sup. Ct. R. 36.4.

INTEREST OF THE AMICUS CURIAE AND SUMMARY OF ARGUMENT

The State of Maryland, like every state, has a strong interest in ensuring that none of its citizens are made targets of harassment calculated to interfere with the free exercise of their civil rights. This interest is particularly strong where, as in the present case, that harassment is motivated by virulent bigotry. Last year, 68 incidents of such harassment against Jews occurred in Montgomery County, where Shaare Tefila is located, alone. Montgomery County, Maryland, Human Relations Commission, Montgomery County Government Hate/Violence Incidents Fact Sheet (October 17, 1986). Harassment calculated to impress upon the members of a minority a bigoted individual's perception of them as inferior to the majority must be a matter of serious concern to the State.

The concurrence below suggested that Maryland law provides remedies for the dese-

cration of Shaare Tefila's synagogue that are both fully effective to redress the synagogue's injuries and more appropriate than the remedies under the federal civil rights laws. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 528 (1986). However, Maryland's laws, like those of most states, do not take direct account of the bigotry underlying conduct such as that alleged in this case. For that reason, the available Maryland state law remedies do not afford appropriate redress for the true nature and magnitude of the injury actually inflicted.

The State of Maryland files this brief to urge reversal of the decision below and to stress the need to protect the victims of the kind of harassment and intimidation involved here through the remedy of the federal civil rights laws.

ARGUMENT

I. The injury inflicted on petitioners is interference with their civil rights.

This case involves far more than the mere painting of graffiti on the walls of a building. Shaare Tefila's synagogue is the center of a Jewish community. It is both the Congregation's place of worship and its members' place of assembly for community activities. 785 F.2d at 524. Moreover, the slogans and symbols painted on the synagogue were not ordinary graffiti. They were instead a deliberate evocation of the horrors of the Holocaust, calculated to intimidate the members of the Jewish community and to cause them extreme mental and emotional distress.

The menace inherent in painting such phrases as "DEAD JEW," "DEATH TO THE JUDE," and "IN, TAKE A SHOWER JEW" on the walls of a synagogue is unmistakable. The purpose of such an act is equally unmistakable. The

perpetrators sought to intimidate the Jewish minority, to deter its members from exercising their most basic civil rights - to hold property, assemble, and worship on an equal footing with the majority.

Hence, the injury to the petitioners in this case is not only the physical damage to their synagogue, nor even solely the emotional distress that they suffered as a natural result of that damage. The injury for which petitioners seek redress - and the conduct that cries out for relief - is gross and direct interference with petitioners' civil rights because of their membership in a minority group.

This suit seeks redress not simply for conduct that damages property and affronts the victims' sensibilities. Rather, the petitioners have been injured by uniquely abhorrent conduct: the deliberate infliction of injury that asserts the victims' alleged

inferiority and unworthiness to live at peace and in equality with the majority.

II. State law does not afford adequate redress for or protection from interference with civil rights.

Some states have enacted statutes that directly sanction deprivations of civil rights on account of the victim's membership in a minority group, by punishing such conduct as criminal or by affording the victim a civil cause of action. National Institute Against Prejudice & Violence, Striking Back at Bigotry: Remedies Under Federal and State Law for Violence Motivated by Racial, Religious, and Ethnic Prejudice 61-63, 81-84 (1986). A bill introduced in the Maryland General Assembly in 1983 would have increased the penalties for such crimes as malicious mischief if the crimes were committed "because of the race, religion, color, or

national origin of another individual" and would have given the victim in such cases a civil cause of action. Maryland Senate Bill 691 (1983). Because the bill was not enacted, Maryland - like most states - has no general civil rights statute.

To be sure, criminal acts such as those often committed by persons with a racial, ethnic, or religious animus are prohibited by Maryland criminal law. E.g., Md. Ann. Code Art. 27, §10A (burning cross or other religious symbol on public or private property without owner's consent); Art. 27, §555B (making anonymous telephone calls to annoy, torment, harass, or embarrass). Nonetheless, such statutes do not take account of whether a particular defendant was motivated by animus toward a minority group.[1]

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[1] For example, the criminal charges for the synagogue desecration in this case arose under Md. Ann. Code Article 27, §111, which makes it a misdemeanor to "wilfully and maliciously destroy, injure, deface or molest any real or (Continued)

Criminal laws are ill-designed and not intended to impress upon a defendant, and others of like mind, that harassment and intimidation of minority groups have no place in a democratic society. The intent of a defendant to harass and intimidate the members of a minority group in the exercise of their civil rights plays no part in the proof of the crime.

Moreover, a defendant's indictment and trial on any applicable charges is largely dependent on prosecutorial discretion. That discretion is exercised in Maryland by an independent State's Attorney in each of the 23 counties and the City of Baltimore, subject to no statewide policy governing its exercise. Murphy v. Yates, 276 Md. 475, 494-

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personal property of another." That crime may be committed by any act done with intent to cause damage or in wilful disregard of the plain and strong likelihood of damage and without justification, excuse, or mitigation. Spears v. State, 38 Md. App. 700, 708, 382 A.2d 616, 620-21, cert. denied, 282 Md. 739 (1978).

95, 348 A.2d 837, 848 (1975). Additionally, conviction may be had only on proof beyond a reasonable doubt that the particular defendant before the court committed the particular crime charged.

In consequence, the efficacy of criminal sanctions against even the defendant's overt acts of destruction of property, for example, may be significantly limited by practical and legal factors wholly extraneous to society's abhorrence of those acts' discriminatory motivation. Furthermore, to the extent that the perpetrators of any civil rights violation go unpunished, our society's ability to deter further depredations on the rights of minorities is undercut, and our commitment to such fundamental values as equal justice under law is diminished.

Civil proceedings in general have preventative advantages over criminal proceedings, as they are initiated by the

victim and are established by proof by a preponderance of the evidence. Yet, like the general criminal laws, traditional civil causes of action take no account of a defendant's bigoted motivations. Accordingly, traditional state tort law is no more effective than general criminal law to impress upon such a defendant the opprobrium with which the community and the state view unlawful acts grounded in bigotry. Those whose prejudice would lead them to interfere with a minority group's civil rights must be made aware that such interference - and not merely the overt acts by which it is accomplished in a particular case - will not be tolerated. Nothing less is likely to deter such persons from further discriminatory conduct.

Simply put, a traditional tort action will not vindicate the real interest that has been invaded in this case. Common law

actions of trespass and nuisance protect the interests in exclusive possession and full enjoyment of land that are common to any owner or occupant.[2] Thus, those actions would afford Shaare Tefila relief only for the unauthorized entry onto its property and the unsightliness of the vandalism, ignoring the discriminatory purpose that underlay the physical damage and the vastly more damaging consequences to the Congregation from this kind of vandalism.

This form of state tort action might indeed be sufficient if Shaare Tefila had been hit by vandals merely looking for any convenient wall on which to spray-paint their nicknames. But it defies both historical sensibility and present reality to maintain that trespass or nuisance causes of action

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[2] Nissan Motor Corp. in U.S.A. v. Maryland Shipbuilding & Drydock Co., 544 F.Supp. 1104, 1116 (D. Md. 1982), aff'd, 742 F.2d 1449 (4th Cir. 1984).

speak to the desecration of Shaare Tefila's synagogue with anti-Semitic slogans and symbols.

Even the common law action for intentional infliction of emotional distress is totally inadequate to the outrageous conduct involved in this case. Here, much more than the petitioners' emotional tranquillity was invaded.[3] The far more important invasion was to their right, as a minority group, to full enjoyment of the civil rights enjoyed by the majority. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 420 (1968).

III. The federal civil rights statutes offer appropriate redress.

The dissent below recognized that the civil rights statutes were expressly designed

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[3] See Harris v. Jones, 281 Md. 560, 570-72, 380 A.2d 611, 616-17 (1977).

to protect against the very sort of bigoted harassment committed in this case. "The Civil Rights Act of 1871, also known as the Ku Klux Klan Act, was designed precisely to provide a federal remedy for activities such as those found in this case. See Griffin v. Breckenridge, 402 U.S 88, 91 S.Ct. 1790 (1971)." Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 534 (4th Cir. 1986) (Wilkinson, J., concurring in part and dissenting in part).

A review of the acts of racial intimidation that triggered passage of the Civil Rights Acts demonstrates the identity of motivation between those incidents and the incident at issue here. The cross-burning, night-riding and defacement of property that inflamed the post-Civil War South were motivated by the view that blacks were an inferior group, not entitled to enjoy the right of full citizenship. Jones v. Alfred

H. Mayer Co., 392 U.S. at 427-29. The defacement of Shaare Tefila's synagogue was likewise motivated by a perception of Jews as an inferior group not entitled to assemble, worship, and hold property on an equal footing with the majority.

The legislative history of the civil rights statutes makes abundantly clear that Congress was well aware of the need to prevent such depredations in order to protect these basic rights. "Wilson lobbied for passage of the bill on the basis that it would 'protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men.'" Ortiz v. Bank of America, 547 F.Supp. 550, 555 (E.D. Cal. 1982), citing Cong. Globe, 39th Congress, 1st Sess. at 118.

The civil rights statutes thus afford - and were intended to afford - a system of

"personalized" justice that is directly addressed to the injury. Cf. Shaare Tefila Congregation v. Cobb, 785 F.2d at 528. The petitioners' very right to live unmolested within the community has been attacked precisely and only because of their membership in a minority group. The only adequate remedy for that injury is the one designed to provide redress for just such violations of civil rights. That remedy - lacking in Maryland law as in the laws of most states - is precisely what the federal civil rights statutes were intended to provide.

> "In enacting the Civil Rights Act of 1866, Congress intended at the very least to supplement state laws.... To now relegate these matters exclusively to state law simply disregards the nature and scope of federal remedies provided by Congress and the unique capacity of federal law to voice a strong and uniform commitment to the eradication of discrimination in our midst."

Shaare Tefila Congregation v. Cobb, 785 F.2d at 534 (Wilkinson, J.).

CONCLUSION

For the foregoing reasons, amicus the State of Maryland urges this Court to reverse the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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